ISSUE DATE: August 15, 2000

DOCKET NO. P-421/C-99-1183

ORDER FINDING JURISDICTION, REJECTING CLAIMS FOR RELIEF, AND OPENING INVESTIGATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner

In the Matter of the Complaint of
AT&T Communications of the Midwest, Inc.
Against U S WEST Communications, Inc.
Regarding Access Service

ISSUE DATE: August 15, 2000

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PROCEDURAL HISTORY

On August 18, 1999, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint under Minn. Stat. § 237.462 claiming that U S WEST Communications, Inc. (U S WEST) was providing inadequate access services to AT&T and was discriminating against AT&T both in providing access services and in building and maintaining the infrastructure necessary to support them. The complaint sought specific remedial action and asked the Commission to conduct an expedited proceeding under Minn. Stat. § 237.462, subd 6, instead of contested case proceedings.

On September 2, 1999, U S WEST filed an answer denying AT&T's claims and opposing an expedited proceeding. The company also filed a Motion for a More Definite Statement and to Strike AT&T's claims, challenging the Commission's jurisdiction over the case.

On September 20, 1999 the Commission issued an Order that denied U S WEST's motion, accepted jurisdiction for purposes of developing the issues, opened an expedited proceeding, and adopted a procedural schedule proposed by the parties. The Commission issued subsequent Orders amending the procedural schedule and resolving discovery disputes.

On November 24, 1999, U S WEST renewed its jurisdictional challenge by filing a Motion for Partial Summary Judgment and to Exclude Irrelevant Evidence. The Commission deferred the motion until the facts had been developed. The Commission held evidentiary hearings in the case on February 16 and 17 and asked the parties to address the motion for partial summary judgment in their post-hearing briefs.

On July 11, 2000 the Commission met to decide the case.

FINDINGS AND CONCLUSIONS

I. Factual Background

"Access services" are services that enable long distance carriers to connect with the local network and transmit long distance calls to and from subscribers. There are two kinds of access services – "dedicated access," which uses a direct and exclusive link between a subscriber and a long distance carrier, and "switched access," which uses the public switching network.

Dedicated access services normally include the use of the local loop and trunking facilities. Switched access services normally include the use of the local loop, local switches, interoffice facilities, and, depending upon individual needs, tandem switches and supporting capabilities such as signaling systems.

When long distance traffic exceeds the carrying capacity of these facilities, long distance calls are blocked. When existing trunking facilities are inadequate, requests for additional access services are deferred or denied. AT&T claimed that call blocking and denial of dedicated access had become so common that U S WEST's access services no longer met statutory standards of reasonableness and adequacy.

II. AT&T's Complaint

A. Factual Claims

AT&T claimed a pattern of inadequate and discriminatory service, based on the following factual allegations:

(1) U S WEST is failing to build and maintain the infrastructure necessary to provide adequate access services to AT&T and its customers;
(2) U S WEST discriminates against AT&T and its customers and in favor of itself, its affiliates, and their customers, as it builds, maintains, and deploys infrastructure;
(3) U S WEST shares with its operating divisions and affiliates information it refuses to share with AT&T regarding which sections of its network are at or near full capacity and which sections will be upgraded in the near term;
(4) U S WEST impedes the economic development of those communities whose access facilities it fails or refuses to upgrade;
(5) U S WEST invests disproportionately in facilities to serve its retail customers, to the detriment of its wholesale customers;

B. Legal Claims

AT&T claimed that U S WEST's actions violate the following Minnesota statutes:

(1) Minn. Stat. § 237.06, requiring reasonably adequate service and facilities;
(2) Minn. Stat. § 237.12, requiring local exchange carriers to permit physical connections with toll carriers for reasonable compensation;

(3) Minn. Stat. § 237.121(a)(2), prohibiting all carriers from intentionally impairing the speed, quality, or efficiency of services provided to consumers under tariffs;
(4) Minn. Stat. § 237.121(a)(4), prohibiting carriers from refusing to provide a service in accordance with its tariffs, price lists, contracts, or Commission rules or orders;
(5) Minn. Stat. § 237.09, prohibiting discrimination in the provision of services to end-users or other carriers.

C. Relief Sought

AT&T sought a Commission Order requiring U S WEST to take the following actions:

(1) Immediately fill all outstanding orders for access services submitted by AT&T;
(2) Report monthly to the Commission and to AT&T on all outstanding, unfilled orders for access services submitted by AT&T, with plans for filling those orders within 30 days;
(3) Report monthly to the Commission and to AT&T on U S WEST's performance in filling orders for access services submitted by AT&T, with plans for remedying any deficiencies;
(4) Report monthly to the Commission and to AT&T on U S WEST's performance in filling orders for access services submitted by other interexchange carriers, by U S WEST itself, and by U S WEST's affiliates;
(5) Respond to AT&T forecasts of future access service needs within two weeks of receipt by notifying AT&T and the Commission of any areas in which access services will be delayed or denied, and by providing a plan to remedy the situation;
(6) File monthly reports identifying any areas in which access or interoffice facilities will not be available over the next twelve months and a plan to remedy the situation;
(7) Pay any applicable damages, fines, or other remedies available under any applicable law.

III. Positions of U S WEST and the Department of Commerce

U S WEST denied that its access services were inadequate, denied that it discriminated against AT&T or any other carrier, and denied that its access services failed to meet statutory standards or tariff requirements. The company also claimed that this Commission had no jurisdiction over most of the access services at issue in the complaint.

On the jurisdictional issue, the Department of Commerce (the Department) urged the Commission to find jurisdiction over all claims in the complaint.

On the merits, the Department contended that AT&T had proved two statutory violations – failure to provide reasonably adequate service and facilities under Minn. Stat. § 237.06 and refusal to provide a service in accordance with tariffs under Minn. Stat. § 237.121(a)(4). The agency recommended establishing tariff-based, remedial deadlines for U S WEST's processing of AT&T orders for access services.

Although the Department considered the remainder of AT&T's claims unproved, the agency believed that AT&T had submitted enough evidence to warrant concern and to justify further

monitoring. The agency submitted a list of detailed monthly reporting requirements which it urged the Commission to impose for at least the next six months.

Finally, the agency recommended that the Commission examine the need for a rulemaking to establish wholesale access service quality standards on a state-wide, industry-wide basis.

IV. Summary of Commission Action

The Commission will deny U S WEST's motion for partial summary judgment, finding that it has jurisdiction over the quality of intrastate access services whether provided under state or federal tariffs. The Commission will therefore consider all service orders involving intrastate traffic placed in evidence by AT&T.

The Commission finds that the record does not demonstrate that U S WEST is failing to provide access services in conformity with its tariffs, does not demonstrate that U S WEST is failing to provide reasonably adequate access services and facilities as required by statute, and does not demonstrate that U S WEST is discriminating against AT&T or any other carrier in its provision of access services. AT&T's allegations have not been proved by a preponderance of the evidence, and the Commission will not grant the substantive relief requested by AT&T and the Department.

At the same time, however, the Commission finds that the record does contain enough evidence of substandard service, missed tariff deadlines, and disparate treatment of retail and wholesale customers, to warrant concern and to justify further monitoring. The Commission will therefore open an investigation into whether it should develop access service quality standards for U S WEST and, if so, what standards would be appropriate. This investigation will be consolidated with the ongoing investigation into U S WEST's wholesale service quality, since both investigations involve similar facilities, many of the same parties, and similar issues.

Finally, to ensure an adequate record for informed decision-making, the Commission will require U S WEST to file, and to serve on AT&T and the Department, monthly reports containing the access service quality information identified as essential by the Department.

These decisions will be explained in turn.

V. The Commission Has Jurisdiction Over the Quality of Intrastate Access Services, Whether Provided Under State or Federal Tariffs

A. The Issue

AT&T claims that the quality of U S WEST's access services, measured largely in terms of how long it takes to install new service, has deteriorated to the point that AT&T can no longer provide reasonably adequate long distance service within the State of Minnesota. AT&T also claims that U S WEST discriminates against AT&T and in favor of itself and its affiliates in the provision of access services.

To prove its case, AT&T introduced hundreds of access service orders, developed "snapshots" showing the status of pending orders as of specific dates, and produced extensive data, both raw and extrapolated, on historical intervals between order dates and service dates.

U S WEST attempted to exclude most of this evidence on grounds that the intrastate services at issue had been ordered under federal tariffs, which it claimed deprived this Commission of any jurisdiction over their quality. (Because FCC rules classify facilities whose traffic is more than 10% interstate as interstate facilities, most access facilities are interstate facilities whose services are subject to federal tariffs.)

U S WEST made three arguments in support of its claim that this Commission did not have, or should not exercise, jurisdiction over U S WEST's intrastate access service quality: (1) Congress, acting through the Federal Communications Commission (FCC), has preempted state regulation of intrastate access service quality; (2) the filed rate doctrine prohibits the Commission from exercising authority over the quality of intrastate services offered under a federal tariff; and (3) even if the Commission has jurisdiction over the quality of these services, it should defer to the FCC under the doctrine of primary jurisdiction.

AT&T and the Department of Commerce disagreed, as does the Commission. Each argument will be examined in turn.

B. Congress has not preempted state regulation of intrastate access service quality

Since 1934, telecommunications services have been subject to both state and federal regulation, with the general rule being that the FCC regulates interstate service and the states regulate intrastate service. Since the same equipment, facilities, and personnel usually provide both interstate and intrastate service, however, jurisdictional issues have often been complex.

In this case, for example, most of the access facilities involved are "mixed use" facilities, providing both interstate and intrastate services. They are classified as interstate facilities, however, because, under FCC cost allocation rules, facilities that carry more than 10% interstate traffic must be classified as interstate, with their services federally tariffed.[1] The issue here is whether that cost allocation rule, which clearly preempts state authority to require state tariffs, also preempts state authority over the quality of these intrastate services. The Commission finds that it does not.

The United States Supreme Court has articulated a fact-intensive test for determining whether preemption has occurred in the telecommunications context:

> The Supremacy Clause of Art. VI of the constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there is implicit in federal law a barrier to state regulation, . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, . . . or where the state law stands as an obstacle to accomplishment and execution of the full objectives of

[1] 47 C.F.R. § 36.154.

Congress. . . . [2]

None of the preemption conditions described by the Court pertains here.

1. No clear expression of Congressional intent to preempt state law

Congress has not expressed a clear intent to preempt state authority over intrastate access service quality. There is nothing in title 47 stating, or even suggesting, that intrastate service quality has become an exclusively federal concern. In fact, the opposite is true.

First, Congress has long been at pains to make it clear that the FCC shares jurisdiction over the nation's telecommunications network with the states. Because reliable, affordable telecommunications are critical to the well-being of both the states and the nation, these services have long been subject to both state and federal regulation. Since 1934, the Telecommunications Act has contained some version of the current 47 U.S.C. § 152 (b), which states

> . . . nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . .

Dual jurisdiction has long been the rule in the telecommunications arena. Further, the Telecommunications Act of 1996 expressly preserves state authority to regulate access services for purposes of furthering competition. That is exactly the issue here, where AT&T claims competition is being undermined by the poor quality of U S WEST's wholesale access services and by discrimination in their provision.

> Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or *exchange access*, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.
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> 47 U.S.C. § 261 (c), emphasis added.

Finally, the Telecommunications Act of 1996 recognizes the importance of state oversight of intrastate services – including service quality – as telecommunications markets move from the monopolistic model to the competitive one:

> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section,

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[2] *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-69 (1986) (*citations omitted)*; *Chicago & N.W. Transport Company v. Kalo Brick and Tile Company*, 450 U.S. 311 (1980).

> requirements necessary to preserve and advance universal service, protect the public safety and welfare, *ensure the continued quality of telecommunications services*, and safeguard the rights of consumers.
>
> 47 U.S.C. § 253 (b), emphasis added.

For all these reasons, the Commission concludes that neither Congress nor the FCC has expressed a clear intent to preempt state authority over intrastate access service quality.

2. No outright or actual conflict between federal and state law

There are no federal statutes or regulations establishing wholesale access service quality standards. There is therefore no federal law with which any intrastate service quality directive of this Commission could conflict. Neither is there any federal statute or regulation exempting carriers from complying with intrastate access service quality standards imposed by state regulatory authorities.

The Commission concludes that there is no outright or actual conflict between federal and state law vis-a-vis intrastate access service quality.

3. Compliance not physically impossible; no implicit barrier to state regulation

Since there are no federal wholesale access service quality standards, no service quality remedy imposed by this Commission could put U S WEST in the position of being physically unable to comply with both state and federal law. Neither is there any implicit barrier in federal law to this Commission exercising authority over intrastate access service quality.

4. Congress has not occupied the field; action by this Commission not an obstacle to federal objectives

Neither Congress nor the FCC has undertaken the kind of comprehensive regulation of telecommunications service quality that would suggest or demonstrate an intent to "occupy the field" of intrastate access service quality. In fact, quite the opposite – the statute is at pains to emphasize the continuing role of the states in ensuring service quality.

Similarly, it is implausible to suppose that any action taken by this Commission to remedy defects in U S WEST's intrastate access service quality would in any way stand as an obstacle to the accomplishment and execution of the full objectives of Congress or the FCC.

5. Conclusion

Careful examination of the facts of this case and the doctrine of preemption compels the conclusion that neither Congress nor the FCC has preempted this Commission's authority over the quality of U S WEST's intrastate access services.

C. The Filed Rate Doctrine does not apply

1. The Issue

a. The Filed Rate Doctrine in General

U S WEST claims that the filed rate doctrine prohibits this Commission from requiring its intrastate access service to meet basic service quality requirements, because those requirements are not set forth in its federal tariff. The Department and AT&T disagree, as does the Commission.

The filed rate doctrine is the longstanding regulatory principle that common carriers are bound by the terms of their tariffs; they cannot make side agreements with individual customers, and any side agreements they do make will be stricken. *Black's Law Dictionary*[3] defines the filed rate doctrine in this way:

> **Filed rate doctrine.** Doctrine which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority.

The doctrine was and is central to the regulatory compact. The monopoly carrier providing essential services gives up the right to set its own rates in return for a guaranteed opportunity to recover its expenses and earn a fair rate of return through uniform, tariffed rates. The public gives up the right to bargain with the carrier over rates in return for predictable, fair and reasonable, and non-discriminatory rates.

If the carrier is not bound by the tariffed rates, however, the regulatory compact falls apart. Customers who lack the bargaining power to make side agreements with the carrier may be forced to subsidize those who have the bargaining power to make those agreements. They may even be forced to pay higher-than-tariffed rates to receive equivalent service. For this reason, regulatory agencies and courts have long viewed the filed rate doctrine as vital to the integrity of the regulatory process and have enforced it vigorously.

In 1998 the United States Supreme Court confirmed the doctrine's continuing vitality, in a case brought against AT&T by Central Office Telephone, Inc., a bulk purchaser and reseller of telecommunications services. Central Office believed that AT&T had promised – and failed to deliver – billing, provisioning, and service options not reflected in its tariffs. Central Office sued, claiming breach of contract and tortious interference with its contractual relations with its customers.

The Supreme Court held for AT&T, finding that the filed rate doctrine invalidated any agreement to provide services not described in the tariffs and any agreement to provide services under conditions or time lines different from those prescribed in the tariffs. The Court emphasized that the filed rate doctrine was grounded in the principle of anti-discrimination:

> . . . . This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to *prevent unjust discrimination*.
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> * * * * * * * *

[3] *Black's Law Dictionary,* sixth edition.

> While the filed-rate doctrine may seem harsh in some circumstances, its strict application is necessary to "prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts," the very evil the filing requirement seeks to prevent. . . . Regardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same service. *It is that anti-discriminatory policy which lies at "the heart of the common-carrier section of the Communications Act."*[4]

b. Commission Action

U S WEST cites several cases in which federal courts reject individual customers' claims against common carriers under state contract and tort law, emphasizing that a common carrier's relationship with its customers is governed by its tariff. The company argues that any attempt by this Commission to regulate the quality of federally tariffed intrastate access services would violate the filed rate doctrine, by imposing impermissible extra-tariff requirements on a common carrier. The Commission disagrees.

As discussed above, the purpose of the filed rate doctrine is to preserve the integrity of the regulatory compact by prohibiting side agreements between common carriers and their customers, not to define state regulatory authority over common carriers. All cases cited by U S WEST deal with individual customers raising state law claims against common carriers; none deal with a state regulatory agency attempting to exercise its jurisdiction over intrastate service.

The jurisdictional issue in this case does not turn on the filed rate doctrine – which touches indirectly on federal/state relationships while speaking directly to customer/carrier relationships – but on the doctrine of preemption, which speaks directly to federal/state jurisdictional boundaries. Of course, the Commission has already examined AT&T's claims in light of the law of preemption and has determined that its jurisdiction over intrastate access service quality has not been preempted.

Finally, it is important to note that the filed rate doctrine does not federalize every aspect of the relationship between common carriers and their customers, as Chief Justice Rehnquist noted in his concurring opinion in the *Central Office* case:

> The tariff does not govern, however, the entirety of the relationship between the common carrier and its customers. For example, it does not affect whatever duties state law might impose on a petitioner to refrain from intentionally interfering with respondent's relationships with its customers *by means other than failing to honor unenforceable side agreements*, or to refrain from engaging in slander or libel, or to satisfy other contractual obligations. The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. *It*

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[4] American Telephone and Telegraph v. Central Office Telephone, Inc., 118 S. Ct. 1956, 1962 (1998), emphasis added, citations omitted.

does not serve as a shield against all actions based in state law.[5]

In short, the filed rate doctrine governs carrier/customer relationships for purposes of preventing discrimination. It prohibits AT&T and U S WEST from agreeing that U S WEST will give AT&T higher-quality service than other customers; it does not prohibit this Commission from requiring U S WEST to provide the same high quality of service to all customers of intrastate access services.

The filed rate doctrine does not invalidate agency actions that are otherwise valid under the Supremacy Clause of the Constitution and Title 47. It is not a back-door method of altering the federal/state jurisdictional boundaries which have been evolving under the federal Telecommunications Act since 1934.

For all these reasons, the Commission concludes that the filed rate doctrine does not preclude its jurisdiction over AT&T's claims.

D. The Doctrine of Primary Jurisdiction does not apply

1. The Issue

U S WEST points out that AT&T has filed complaints similar to this one in four other states and urges the Commission to decline to exercise any jurisdiction it might have, under the doctrine of primary jurisdiction. The company argues that primary jurisdiction lies with the FCC, because individual state determinations on these complaints would entail a risk of forum shopping and inconsistent decisions. The Company notes that the Colorado state commission took this position and declined to act on AT&T's complaint despite a finding that it had jurisdiction.

The Department and AT&T disagree, as does the Commission.

2. Commission Action

Primary jurisdiction is not technically a jurisdictional doctrine, but a principle of judicial self-restraint. Courts acting in accord with the doctrine defer to administrative agencies – at least for initial decision-making – issues peculiarly within the agencies' expertise.[6] Primary jurisdiction speaks to relations between courts and administrative agencies, not to relations between administrative agencies. The Commission concludes that the doctrine of primary jurisdiction does not compel, or even support, deferring this complaint to the FCC.

This is not to say that the Commission would *never* decline to take jurisdiction over an issue that could also be heard by another state or federal agency; administrative efficiency is an important goal which is sometimes best served by deferring an issue to another agency. The issue of intrastate access service quality, however, is too intensely local and critically important to defer. Minnesota businesses and households depend upon this Commission to ensure that they have working long distance service at all times. The Commission cannot responsibly defer this

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[5] Central Office at 1963, emphasis added.

[6] *Black's Law Dictionary,* sixth edition.

responsibility to another agency.

Finally, the claims that the Commission should defer to the FCC to discourage forum-shopping and prevent inconsistent adjudications of AT&T's five complaints are not persuasive. It is not forum-shopping to ask a state commission to enforce its state's telecommunications statutes; it is simply choosing an appropriate forum for that claim.

Neither is it cause for consternation that different state commissions may reach different conclusions about AT&T's claims. The possibility of different decisions in different states is the natural result of different factual situations in different states. It is also a foreseeable consequence of providing, in more than one state, an intensely local, essential service for which state and federal agencies share regulatory responsibility.

For all these reasons, the Commission concludes that it need not and should not decline to take jurisdiction over AT&T's complaint under the doctrine of primary jurisdiction.

VI. AT&T Has Failed to Prove Statutory or Tariff Violations by U S WEST

A. Positions of the Parties

1. AT&T

AT&T claimed that the record demonstrated a consistent and pervasive pattern of unreasonable delay by U S WEST in filling AT&T orders for wholesale access services. To prove its case the company introduced hundreds of access service orders, developed "snapshots" showing the status of pending orders as of specific dates, and produced extensive data, both raw and extrapolated, on historical intervals between order dates and service dates.

The company claimed these delays violated U S WEST's state and federal tariffs and state laws requiring reasonable and adequate service, requiring local exchange carriers to interconnect with toll carriers, prohibiting carriers from intentionally impairing the quality of services to consumers, and prohibiting carriers from refusing to provide any service it was lawfully obligated to provide.

AT&T also claimed that the record showed that U S WEST discriminated against AT&T in at least two ways: (1) by installing access services more quickly for retail customers than wholesale customers; and (2) by investing disproportionately in wire centers with high retail growth, as opposed to high wholesale growth.

2. The Department of Commerce

The Department of Commerce believed that, while there was some evidence in the record to support AT&T's discrimination claims, the company had failed to prove these claims by a preponderance of the evidence. The Department reached the same conclusion about AT&T's claim of inadequate investment in the infrastructure, although here, too, the agency found some support for the claim in the record. In both cases the Department recommended careful monitoring of these issues, including monthly reporting requirements designed to expose any discriminatory behavior or unreasonable investment decisions.

The agency considered the remaining adequacy of service claim a closer call, but finally concluded that AT&T had proved this claim by a preponderance of the evidence:

> AT&T failed to provide specific evidence of U S WEST's timeliness vis-a-vis the tariff deadlines for several reasons. First, AT&T's exhibits sometimes aggregated the results of all 14 states in U S WEST's service territory and sometimes contained nation-wide results. Second, AT&T's data on timely service provision consistently failed to separate orders in which facilities were available from orders in which facilities were not available. Tr. Vol. 2-A at 448 (Wilson). This omission is significant because the SIG [Service Interval Guide] imposes the five-to-nine day installation deadlines only when facilities are in place for the order.
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> Nevertheless, AT&T provided sufficient evidence of a pattern of untimely and inadequate service by U S WEST to conclude that the percentage of missed orders under the tariff must be unreasonably high. . . .
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> Initial Post-Hearing Brief of the Department of Commerce, p. 20.

3. U S WEST

U S WEST denied providing inadequate service, denied failing to comply with its tariffs, denied discriminating against AT&T or any other carrier, denied that it had ever refused to provide any service it was lawfully required to provide, and denied that the any of AT&T's claims had been proved by a preponderance of the evidence.

The company pointed out that its tariffs prescribed consequences for failing to meet tariff time lines (forfeiting installation charges), which suggested that the tariff anticipated something less than 100% on-time performance. The company emphasized that no one had claimed that it had failed to waive installation charges for customers whose service was installed after tariff time lines.

The company introduced evidence which it claimed showed that AT&T caused at least as many delays in installing access services as U S WEST, by submitting incomplete orders and by being unprepared to accept service when U S WEST was prepared to install it.

Finally, U S WEST claimed that AT&T's data on installation intervals was unreliable and non-probative for several reasons:

(1) at many points it failed to distinguish between service orders involving existing facilities and service orders requiring new facilities;

(2) it often failed to separate Minnesota-specific data from data for U S WEST's entire 14-state service area;

(3) it sometimes included installation intervals for projects that everyone agreed would be performed on a flexible schedule, distorting the statistical averages.

B. Commission Action

The Commission finds that AT&T has failed to prove any of its claims by a preponderance of the evidence.

1. The Inadequate Service Claim

While the data introduced to support the inadequate service claim was suggestive, it did not meet the preponderance of the evidence standard. To find service inadequate under that standard, the Commission would need less ambiguous, Minnesota-specific data pointing to pervasive and significant service quality defects. That is something this record lacks.

Little of the data presented in this case was Minnesota-specific. Much was system-wide, dealing with access services in all 14 U S WEST states; some was even nation-wide. Much of it failed to distinguish between interstate and intrastate services. Furthermore, even if the Commission had been willing to extrapolate from system-wide data to reach conclusions about Minnesota service quality, flaws in the data itself made relying on it imprudent.

Many of the statistical averages for installation intervals, for example, were based on service order data which included orders that everyone agreed would be done on a time-available basis, seriously distorting outcomes. Even worse, data on installation intervals consistently failed to distinguish between service orders involving existing facilities and service orders requiring new facilities. Since only orders involving existing facilities are subject to established installation interval guidelines, including other orders in the mix made conclusions about on-time performance wholly unreliable.

For all these reasons, the Commission finds that AT&T's claims of inadequate service have not been proved by a preponderance of the evidence.

2. The Discrimination Claims

The discrimination claims, too, have some support in the record but fail to reach the preponderance of the evidence standard. Most of the evidence filed in support of these claims was anecdotal. (That which was not anecdotal, but statistical, suffered from the same defects discussed above.)

To support its discrimination claim AT&T pointed to one Minnesota incident involving access services and one Iowa incident involving local exchange services. In the Minnesota incident AT&T stated that U S WEST deferred its request for access services for a particular customer on

the basis of insufficient capacity, but found sufficient capacity when the customer requested the same services at retail from U S WEST. In the Iowa incident U S WEST responded promptly to a customer's request for retail local exchange service, but had delayed responding to a competitor's request for resold local exchange service to serve the same customer.

In the Iowa case the state commission found that it was far from clear that U S WEST had intentionally discriminated against its competitor or even that its practices needed to change. The commission found only that the company had made a mistake with anti-competitive consequences and should be put on notice that future mistakes would be viewed less indulgently.[7]

Like the Iowa commission, this commission is unable to conclude from the facts of the Minnesota incident that U S WEST intentionally discriminated against AT&T in that instance, let alone that it discriminates against AT&T systematically, as AT&T claims.

Similarly, the Commission cannot find discrimination on the basis of AT&T's statements that some business customers have reportedly been promised shorter installation intervals by U S WEST's retail division than AT&T has been promised by the wholesale division for the same service. Not only are the facts surrounding these quotes vague – making it impossible to establish that all factors affecting both quotes are identical – but customers negotiating for the same service with two vendors tend to characterize each vendor's offer to the other vendor in the most advantageous terms.

While these reports from business customers may justify further investigation, they do not, by themselves or in conjunction with the other evidence offered by AT&T, support a finding of unlawful discrimination under the Minnesota Telecommunications Act.

Finally, AT&T claims that a U S WEST program ranking wire centers as gold, silver, or bronze for capital investment planning purposes was discriminatory, because projected retail growth was a significant ranking factor. AT&T claims that this improperly subordinated the needs of wholesale customers to the needs of retail customers. The company also raises public policy/equity issues, comparing the program to the illegal lending practice of redlining.

While U S WEST's decision-making process for scheduling capital improvements may warrant examination at some point, this record does not establish that U S WEST invests in infrastructure with discriminatory intent or effect. The company, after all, must have a workable analytical framework for scheduling and siting major system improvements. Retail growth is a legitimate and presumably highly predictive indicator of future need. Further, it was not the only indicator used by the company.

Finally, although AT&T claims that wire centers with high retail growth are not necessarily the same wire centers as those with high wholesale growth, the record does not establish how large the retail/wholesale disparity is or how frequently it occurs. U S WEST, on the other hand, claims that the correlation between retail and wholesale growth potential is so high that it makes little sense to distinguish between the two. And there is certainly no clear evidence in the record of disparate impact of capital investment decisions on high-wholesale-growth wire centers. For all these reasons, the Commission concludes that this record does not establish that

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[7] Final Decision and Order, McLeodUSA Telecommunications Service, Inc. v. U S WEST Communications, Inc., Docket No. FCU-99-5 (February 21, 2000).

U S WEST has discriminated against AT&T in the provision of access services.

VII. The Record Demonstrates a Need to Open an Investigation into Whether this Commission Should Develop Wholesale Access Service Quality Standards for U S WEST

Although the evidence in this record does not compel findings of statutory or tariff violations by U S WEST, it does demonstrate a clear need for further investigation, careful monitoring, and, potentially, wholesale access service quality standards for U S WEST. Ensuring reliable, high quality long distance service between all Minnesota households and businesses is one of this Commission's highest priorities. The record in this case raises the serious possibility that the quality of U S WEST's wholesale access services may jeopardize this important goal.

The Commission will therefore open an investigation under Minn. Stat. § 237.081 to determine whether there is a need to develop wholesale access service quality standards for U S WEST. In the interests of administrative efficiency, the Commission will incorporate this investigation into the ongoing proceeding to develop wholesale service quality standards for transactions between U S WEST and Competitive Local Exchange Carriers (CLECs).[8] Most of the facilities involved in the two cases will be similar; many of the parties will be the same; the issues will be similar. It will conserve the resources of all parties to combine the two efforts.

While U S WEST has urged an industry-wide rulemaking in place of this investigation, a rulemaking seems over-broad at this point. The access service quality problems AT&T reports appear to be unique to U S WEST. AT&T states that U S WEST is the only local exchange carrier presenting these problems. The Department concurs that U S WEST is the only local exchange carrier about whose wholesale access service quality they consistently receive complaints. The Commission concludes that at this point the investigation should focus on U S WEST's wholesale access service quality; any industry-wide problems can and will be dealt with as they arise.

The Department has developed a list of detailed reporting requirements to help isolate and identify any instances or patterns of inadequate service, discriminatory behavior, or unreasonable investment decisions by U S WEST. These requirements will produce a solid factual foundation for the investigation, as well as for the development of any wholesale access service quality standards the investigation shows to be necessary. The Commission will accept the Department's recommendation to require these filings monthly for six months, evaluating at the end of that time whether they continue to be needed.

The Commission will so order.

ORDER

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[8] This proceeding, Docket No. P-421/AM-00-849, was initiated in the U S WEST/Qwest merger case, In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc. and U S WEST Communications, Inc., Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192, ORDER ACCEPTING SETTLEMENT AGREEMENTS AND APPROVING MERGER SUBJECT TO CONDITIONS (June 28, 2000).

1. AT&T's claims for relief are denied in their entirety.

2. U S WEST's motion for partial summary judgment and to exclude irrelevant evidence is denied.

3. The Commission hereby opens an investigation into whether there is a need to develop wholesale access service quality standards for U S WEST and if so, what standards would be appropriate.

4. The Commission incorporates this investigation into the ongoing proceeding to set wholesale service quality standards for U S WEST in its transactions with CLECs, Docket No. P-421/AM-00-849.

5. U S WEST shall provide the information set forth below to the Commission, the Department, and AT&T on a monthly, Minnesota-specific basis, for six months from the date of this Order:

Missed and Held Orders

For each of three categories of service recipients (U S WEST's provision of access service to AT&T; to other wholesale customers; and to U S WEST and its affiliates), the total number of orders for DS0, DS1 and DS3 dedicated access during the reporting period. For each of the three categories of service recipients, the information below should be provided.

a. The total number of orders for dedicated access during the reporting period, divided into situations in which (1) facilities were available, and (2) facilities were not available.

1. For the orders in which facilities were available;

(a) the number of the orders;
(b) out of this number, the number of orders that were not completed by the later of the SIG interval or the CDDD;
(c) b as a percentage of a;
(d) out of b, the number of orders for which U S WEST was ready on time but AT&T or another carrier was not;
(e) the number of missed orders (b less d);
(f) for the orders in e, the average days beyond the later of the SIG interval or the CDDD;
(g) e as a percentage of a.

2. For the orders in which facilities were unavailable:

(a) the number of the orders, and for each order, an identification of which facility was unavailable:
i) between the end user and the nearest central office;

ii) central office;
iii) interoffice;
iv) between the carrier's POP and the central office nearest the POP.
v) other

(b) out of this number, the number of orders that were not completed by the later of 45 days or the CDDD;
(c) b as a percentage of a;
(d) out of b, the number of orders for which U S WEST was ready on time but AT&T or another carrier was not;
(e) the number of missed orders (b less d);
(f) e as a percentage of a.

b. The number of held orders at the end of the reporting period, and for each order, an identification of which facility was unavailable:

1. between the end user and the nearest central office;
2. central office;
3. interoffice;
4. between the carrier's POP and the central office nearest the POP;
5. other.

c. Plans to reduce the number of held orders and missed orders.

Timely Provision of an FOC

For each of the total orders missed where facilities were available and where facilities were not available, state the number of orders for which a FOC was not returned within 48 hours of the submission of an application that is sufficiently detailed and accurate to allow U S WEST to enter the order into its system.

Availability of Facilities

Identify the areas in Minnesota service territory where U S WEST will not have sufficient facilities available in the succeeding six months to allow the installation of a special access order of three circuits or fewer.

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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